

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

YVONNE DAVIS,

Plaintiff,

v.

CAROLYN W. COLVIN,  
Commissioner of Social Security,

Defendant.

NO. EDCV 12-953 AGR

MEMORANDUM OPINION AND  
ORDER

Plaintiff Yvonne Davis filed this action on June 20, 2012. Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the magistrate judge on July 9 and 13, 2012. (Dkt. Nos. 8, 9.) On February 28, 2013, the parties filed a Joint Stipulation that addressed the disputed issues. The court has taken the matter under submission without oral argument.

Having reviewed the entire file, the court reverses the decision of the Commissioner and remands for further proceedings consistent with this opinion.

## I.

**PROCEDURAL BACKGROUND**

On August 11, 2008, Davis filed an application for disability insurance benefits alleging an onset date of August 28, 2007. AR 10. The application was denied initially and upon reconsideration. AR 56-57. Davis requested a hearing before an Administrative Law Judge (“ALJ”). On June 9, 2010, the ALJ conducted a hearing at which Davis and a vocational expert (“VE”) testified. AR 19-55. On July 23, 2010, the ALJ issued a decision denying benefits. AR 7-15. On April 20, 2012, the Appeals Council denied the request for review. AR 1-3. This action followed.

## II.

**STANDARD OF REVIEW**

Pursuant to 42 U.S.C. § 405(g), this court reviews the Commissioner’s decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence, or if it is based upon the application of improper legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995) (per curiam); *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

“Substantial evidence” means “more than a mere scintilla but less than a preponderance – it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In determining whether substantial evidence exists to support the Commissioner’s decision, the court examines the administrative record as a whole, considering adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. When the evidence is susceptible to more than one rational interpretation, the court must defer to the Commissioner’s decision. *Moncada*, 60 F.3d at 523.

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28**III.**  
**DISCUSSION****A. Disability**

A person qualifies as disabled, and thereby eligible for such benefits, “only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” *Barnhart v. Thomas*, 540 U.S. 20, 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003).

**B. The ALJ’s Findings**

The ALJ found Davis met the insured status requirements through December 31, 2011. AR 12. Davis had the severe impairment of rheumatoid arthritis. She did not meet or equal a listing. *Id.* Davis had the residual functional capacity (“RFC”) to perform medium work, in that she “can lift and/or carry 50 pounds occasionally and 25 pounds frequently; stand and/or walk 4 hours in an 8-hour day using a cane as needed; and sit 6 hours in an 8-hour workday. She can climb stairs but she cannot climb ladders, work at heights, or balance. She can stoop, bend, crouch, and crawl occasionally. She can do fine manipulation with the left hand frequently. She should avoid concentrated exposure to extreme heat or cold.” AR 13-14. She is capable of performing her past relevant work as an in-home care provider, warehouse worker and supervisor of janitorial services. AR 14.

**C. Treating Physician**

Davis contends the ALJ did not properly consider the opinion of her treating physicians.

An opinion of a treating physician is given more weight than the opinion of non-treating physicians. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). To reject an uncontradicted opinion of a treating physician, an ALJ must state clear

1 and convincing reasons that are supported by substantial evidence. *Bayliss v.*  
2 *Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). When, as here, a treating  
3 physician's opinion is contradicted by another doctor, "the ALJ may not reject this  
4 opinion without providing specific and legitimate reasons supported by substantial  
5 evidence in the record. This can be done by setting out a detailed and thorough  
6 summary of the facts and conflicting clinical evidence, stating his interpretation  
7 thereof, and making findings." *Orn*, 495 F.3d at 632 (citations and quotation  
8 marks omitted). "When there is conflicting medical evidence, the Secretary must  
9 determine credibility and resolve the conflict." *Thomas v. Barnhart*, 278 F.3d 947,  
10 956-57 (9th Cir. 2002) (citation and quotation marks omitted).

11 On June 11, 2009, Dr. Roth completed a Family Medical Leave Act  
12 ("FMLA") form indicating that Davis' husband "may be needed for care assistance  
13 and transportation during incapacity," which was likely to occur 2-3 days per  
14 month. AR 350.

15 On the same date, Dr. Lin completed a Work Status Report in which he  
16 placed Davis on modified activity at work during the period June 11, 2009 through  
17 June 11, 2010. AR 351. The restrictions consisted of the following: standing  
18 continuously no more than 60 minutes at one time; walk continuously no more  
19 than 20 minutes at one time; sit no more than 2 hours per day; drive continuously  
20 no more than 30 minutes at one time; climb stairs no more than 20 cumulative  
21 minutes per hour; reach above right or left shoulder no more than 2 minutes at  
22 one time; keyboard/mouse use continuously no more than 10 minutes at one  
23 time; repetitive right or left hand motions continuously no more than 5 minutes at  
24 one time; gripping/grasping right or left hand no more than 5 minutes at one time;  
25 and lift/carry/push/pull no more than 5 pounds for no longer than 15 minutes per  
26 hour. *Id.*

27 The ALJ did not mention either document. The ALJ's consideration of the  
28 medical records is contained in one paragraph. In pertinent part, the ALJ noted

1 that Davis' complaints of pain were treated with analgesic medications and  
2 prednisone. "X-ray studies of the claimant's bilateral wrists dated May 4, 2010  
3 indicated osteoarthritic changes, left more than right." AR 13. A diagnosis of  
4 fibromyalgia was added based on Davis' subjective complaints. *Id.*

5 The Commissioner first argues that neither document contains a medical  
6 source opinion because they were not prepared for an appropriate purpose.  
7 However, "in the absence of other evidence to undermine the credibility of a  
8 medical report, the purpose for which the report was obtained does not provide a  
9 legitimate basis for rejecting it." *Reddick v. Chater*, 157 F.3d 715, 726 (9th Cir.  
10 1998). The regulation provides that medical opinions are statements that "reflect  
11 judgments about the nature and severity of your impairment(s), including your  
12 symptoms, diagnosis and prognosis, what you can still do despite impairment(s),  
13 and your physical and mental restrictions." 20 C.F.R. § 404.1527(a)(2).

14 Although the FMLA form might not warrant remand on its own, the ALJ  
15 could not simply ignore the restrictions in Dr. Lin's Work Status Report and  
16 whether they conflicted with the RFC assessment. *See Hill v. Astrue*, 698 F.3d  
17 1153, 1160 (9th Cir. 2012); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038 n.10 (9th  
18 Cir. 2007) (ALJ cannot avoid requirements for consideration of treating physician  
19 opinion "simply by not mentioning the treating physician's opinion and making  
20 findings contrary to it."). The Commissioner argues that there are reasons for  
21 discounting Dr. Lin's opinions. However, because the ALJ did not articulate these  
22 reasons, the court cannot consider them. *Tommasetti v. Astrue*, 533 F.3d 1035,  
23 1039 n.2 (9th Cir. 2008); *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003)  
24 ("We are constrained to review the reasons the ALJ asserts.").

25 This matter must be remanded for consideration of Dr. Lin's Work Status  
26 Report and the FMLA form to the extent appropriate.

#### 27 **D. RFC**

28 The RFC measures the claimant's capacity to engage in basic work

activities. *Bowen v. New York*, 476 U.S. 467, 471, 106 S. Ct. 2022, 90 L. Ed. 2d 462 (1986). The RFC is a determination of “the most [an individual] can still do despite [his or her] limitations.” 20 C.F.R. § 404.1545(a). It is an administrative finding, not a medical opinion. 20 C.F.R. § 404.1527(e)(2).

Given that this matter is being remanded to consider Dr. Lin’s opinions and the FMLA form, the ALJ should reconsider Davis’ RFC assessment on remand.<sup>1</sup>

#### **E. Past Relevant Work**

“At step four of the sequential analysis, the claimant has the burden to prove that he cannot perform his prior relevant work ‘either as actually performed or as generally performed in the national economy.’” *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1166 (9th Cir. 2008) (citation omitted).

“Although the burden of proof lies with the claimant at step four, the ALJ still has a duty to make the requisite factual findings to support his conclusion.” *Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir. 2001). The ALJ must make “specific findings as to the claimant’s residual functional capacity, the physical and mental demands of the past relevant work, and the relation of the residual functional capacity to the past work.” *Id.* at 845; Social Security Ruling (“SSR”) 82-62;<sup>2</sup> see also 20 C.F.R. §§ 404.1520(e), 416.920(e).

Given that this matter is being remanded for consideration of Dr. Lin’s opinions, the FMLA form, and Davis’ RFC assessment, the ALJ is free to reconsider whether Davis can perform her past relevant work.

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<sup>1</sup> The ALJ found that Davis could stand and/or walk 4 hours in an 8-hour day using a cane as needed, yet at the same time found that Davis could perform medium work in that she can lift and/or carry 50 pounds occasionally and 25 pounds frequently, presumably with a cane. AR 13-14. The ALJ should also reconsider the interrelationship between these restrictions.

<sup>2</sup> Social Security rulings do not have the force of law. Nevertheless, they “constitute Social Security Administration interpretations of the statute it administers and of its own regulations,” and are given deference “unless they are plainly erroneous or inconsistent with the Act or regulations.” *Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989).

1           **F.     Listing 14.09A**

2           Davis argues that the ALJ failed to consider properly whether she met or  
3 equaled Listing 14.09A.

4           The claimant bears the burden of demonstrating that her impairments are  
5 equivalent to a listed impairment that the Commissioner acknowledges are so  
6 severe as to preclude substantial gainful activity. *Bowen v. Yuckert*, 482 U.S.  
7 137, 141, 146 n. 5, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987). “If the impairment  
8 meets or equals one of the listed impairments, the claimant is conclusively  
9 presumed to be disabled.” *Id.* at 141; *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th  
10 Cir.1999); 20 C.F.R. §§ 404.1520(4)(iii), 416.920(4)(iii).

11           “For a claimant to show that her impairment matches a listing, it must meet  
12 *all* of the specified medical criteria. An impairment that manifests only some of  
13 those criteria, no matter how severely, does not qualify.” *Sullivan v. Zebley*, 493  
14 U.S. 521, 530, 110 S. Ct. 885, 107 L. Ed. 2d 967 (1990) (emphasis in original).

15           “To *equal* a listed impairment, a claimant must establish symptoms, signs  
16 and laboratory findings ‘at least equal in severity and duration’ to the  
17 characteristics of a relevant listed impairment, or, if a claimant’s impairment is not  
18 listed, then to the listed impairment ‘most like’ the claimant’s impairment.”  
19 *Tackett*, 180 F.3d at 1099 (emphasis in original); 20 C.F.R. § 404.1526. “‘Medical  
20 equivalence must be based on medical findings.’ A generalized assertion of  
21 functional problems is not enough to establish disability at step three.” *Tackett*,  
22 180 F.3d at 1100 (citation omitted).

23           Davis contends that she has persistent inflammation of one or more major  
24 peripheral weight-bearing joints resulting in the inability to ambulate effectively as  
25 defined in 14.00C6, which uses the same definition in 1.00B2b. An inability to  
26 ambulate effectively is defined as “an extreme limitation of the ability to walk; i.e.,  
27 an impairment(s) that interferes very seriously with the individual’s ability to  
28 independently initiate, sustain, or complete activities. Ineffective ambulation is



1 defined generally as having insufficient lower extremity functioning (see 1.00J) to  
2 permit independent ambulation without the use of a hand-held assistive device(s)  
3 that limits the functioning of both upper extremities.” 20 C.F.R. pt. 404, subpt. P,  
4 app. 1, § 1.00B.2.b(1). An example includes “the inability to walk without the use  
5 of a walker, two crutches or two canes . . . .” *Id.* § 1.00B.2.b(2). Davis testified  
6 that she uses one cane periodically when her back is bad or when her feet,  
7 knees or legs give out and she needs support. AR 42. Her cane was not  
8 prescribed by a doctor. Davis has not shown an inability to ambulate within the  
9 meaning of the listings.

10 Davis also contends that she has persistent inflammation of one or more  
11 major peripheral joints in each upper extremity resulting in the inability to perform  
12 fine and gross movements effectively as defined in 14.00C7. An inability to  
13 perform fine and gross movements refers to an extreme loss of functioning in  
14 both hands. *Id.* § 1.00.B.2.c. Examples include an inability to prepare a simple  
15 meal, take care of personal hygiene, sort and handle papers and files, or place  
16 files in a cabinet at or above waist level. *Id.* The ALJ found that Davis’ only  
17 limitation was that she could do fine manipulation with the left hand frequently.  
18 AR 13-14. Dr. Lin assessed that Davis could perform repetitive right or left hand  
19 motions, or grip/grasp with the right or left hand, continuously no more than 5  
20 minutes at a time. AR 351. Davis has not shown an inability to perform fine or  
21 gross movements effectively within the meaning of the listings.

#### 22 **G. Credibility**

23 Davis contends the ALJ failed to articulate legally sufficient reasons for  
24 rejecting her symptom testimony.

25 “To determine whether a claimant’s testimony regarding subjective pain or  
26 symptoms is credible, an ALJ must engage in a two-step analysis.” *Lingenfelter*,  
27 504 F.3d at 1035-36. First, “the ALJ must determine whether the claimant has  
28 presented objective medical evidence of an underlying impairment ‘which could



1 reasonably be expected to produce the pain or other symptoms alleged.” *Id.*  
2 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)).

3 Although the ALJ made no explicit finding, it is reasonable to assume that Davis  
4 satisfies the first step of the analysis.

5 “Second, if the claimant meets this first test, and there is no evidence of  
6 malingering, ‘the ALJ can reject the claimant’s testimony about the severity of her  
7 symptoms only by offering specific, clear and convincing reasons for doing so.’”  
8 *Lingenfelter*, 504 F.3d at 1036 (citations omitted). “In making a credibility  
9 determination, the ALJ ‘must specifically identify what testimony is credible and  
10 what testimony undermines the claimant’s complaints.’” *Greger v. Barnhart*, 464  
11 F.3d 968, 972 (9th Cir. 2006) (citation omitted). “[T]o discredit a claimant’s  
12 testimony when a medical impairment has been established, the ALJ must  
13 provide specific, cogent reasons for the disbelief.” *Orn*, 495 F.3d at 635 (citations  
14 and quotation marks omitted). “The ALJ must cite the reasons why the claimant’s  
15 testimony is unpersuasive.” *Id.* (citation and quotation marks omitted).

16 In weighing credibility, the ALJ may consider factors including: the nature,  
17 location, onset, duration, frequency, radiation, and intensity of any pain;  
18 precipitating and aggravating factors (e.g., movement, activity, environmental  
19 conditions); type, dosage, effectiveness, and adverse side effects of any pain  
20 medication; treatment, other than medication, for relief of pain; functional  
21 restrictions; the claimant’s daily activities; and “ordinary techniques of credibility  
22 evaluation.” *Bunnell*, 947 F.2d at 346 (citing SSR 88-13) (quotation marks  
23 omitted). The ALJ may consider (a) inconsistencies or discrepancies in a  
24 claimant’s statements; (b) inconsistencies between a claimant’s statements and  
25 activities; (c) exaggerated complaints; and (d) an unexplained failure to seek  
26 treatment. *Thomas*, 278 F.3d at 958-59.

27 Here, the ALJ found that Davis’ allegations were credible only to the extent  
28 they were consistent with the RFC assessment. The ALJ articulated only one

1 reason: "The severity of her symptoms is not well supported by the objective  
2 medical evidence." AR 14. Although lack of medical evidence is a factor the ALJ  
3 may consider in the credibility analysis, it cannot form the sole basis for  
4 discounting subjective allegations. *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.  
5 2005). The ALJ erred. On remand, the ALJ must reconsider Davis' credibility.

6 **H. Lay Witness Testimony**

7 "In determining whether a claimant is disabled, an ALJ must consider lay  
8 witness testimony concerning a claimant's ability to work." *Stout v. Comm'r of*  
9 *Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006). "When an ALJ discounts  
10 the testimony of lay witnesses, 'he [or she] must give reasons that are germane  
11 to each witness.'" *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 694  
12 (9th Cir. 2009) (citation omitted).

13 On remand, the ALJ is free to reconsider the lay witness evidence.

14 **IV.**

15 **ORDER**

16 IT IS HEREBY ORDERED that the decision of the Commissioner is  
17 reversed and this matter is remanded for further proceedings consistent with this  
18 opinion.

19 IT IS FURTHER ORDERED that the Clerk serve copies of this Order and  
20 the Judgment herein on all parties or their counsel.

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22 DATED: March 6, 2013

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ALICIA G. ROSENBERG  
United States Magistrate Judge